

# Montana Transportation Commission

**May 25, 2006 meeting**

Montana Department of Transportation headquarters building  
2701 Prospect Avenue ~ Helena, MT

## In attendance:

Bill Chairman Kennedy, Transportation Commission Chair  
Nancy Commissioner Espy, Transportation Commission Vice Chair  
Kevin Commissioner Howlett, Transportation Commissioner  
Rick Commissioner Griffith, Transportation Commissioner  
Deb Commissioner Kottel, Transportation Commissioner  
Jim Lynch, Director –Montana Department of Transportation (MDT)  
Jim Currie, MDT Deputy Director  
Tim Reardon, MDT Chief Counsel  
Sandra Straehl, MDT Rail, Transit & Planning Administrator  
Loran Frazier, MDT Chief Engineer  
Mike Duman, Assistant FHWA Division Administrator  
Ted Burch, FHWA Program Development Engineer  
Lorelle Demont, Transportation Commission Secretary

*Please note:* the complete recorded minutes are available for review on the commission's website at [http://www.mdt.mt.gov/pubinvolve/trans\\_comm/meetings.shtml](http://www.mdt.mt.gov/pubinvolve/trans_comm/meetings.shtml). You may request a compact disc (containing the audio files, agenda, and minutes) from the transportation secretary at (406) 444-7200 or [ldemont@mt.gov](mailto:ldemont@mt.gov). Alternative accessible formats of this document will be provided upon request. For additional information, please call (406) 444-7200. The TTY number is (406) 444-7696 or 1-800-335-7592.

Chairman Kennedy called the meeting to order at 8:05 am.

After the pledge of allegiance, Commissioner Howlett offered an invocation.

Chairman Kennedy asked if there were any changes to the agenda. Lynch said we have received a request for an outdoor advertising permit. We denied that and through the rules and requirements, they have a right to ask you to appoint a hearing examiner to hear their case. We ask that you appoint a hearing examiner as requested. Reardon said this falls under the commission's administrative functions. Unless the commission wishes to conduct the hearing in person, you need to appoint a hearing officer who will conduct the hearing and prepare a written recommendation for you. This is the standard process under the administrative procedures act. I think the appointment is an appropriate thing; Lamar is entitled to a hearing.

## **Appointment of a hearings officer – LAMAR Advertising**

Reardon said by way of background, we received an application for a sign upgrade to be located in Billings from Lamar Advertising in Billings. Their proposal was to upgrade an existing sign face to electronic LED message board. The permit application was reviewed by the department's outdoor advertising staff and the permit was denied. The denial was based primarily on an existing rule that prohibits such boards. The department thought that, in the absence of rules that would establish sideboards on how bright a sign could be, content of the message, the department denied the permit. Under the Montana Administrative Procedures Act, they appealed the decision to the commission. The commission has the jurisdictional authority over the outdoor advertising at the administrative level. They are entitled to a hearing. The request we have at this time is to appoint hearings officer to conduct a hearing on the Lamar outdoor advertising application.

I can't tell you what their theory is, but I assume that they believe under existing state law, that they are entitled to upgrade an existing sign to an LED board. Whether that's accurate or not, I don't know. If it's true, then perhaps the existing rule prohibiting it won't stand legal muster. I don't know that. But that's I think the sum and substance of what this appeal is going to ultimately have to be decided. They're appealing it under existing law. We have contacted the office of the Attorney General, who is by statute, the entity to whom you

go first for a hearings officer. We have the name of hearings officer, and, with the approval of the commission, I have an order for the commission chair to sign.

Commissioner Griffith moved to appoint a hearings examiner to hear this case; Commissioner Kottel seconded the motion.

Commissioner Kottel asked what the process is to exhaust administrative remedies. Reardon said after the hearing, a report will be brought back to the commission to adopt, modify or reject the information, along with a recommendation from Director Lynch. From there, they can appeal to the district court.

The motion passed unanimously.

## **Agenda item 2: Wetland Credit Purchase**

### *Selkirk Wetland Mitigation Site*

Straehl said this agenda item requests commission approval to purchase 50 completed wetland credit acres.

The proposed site is located directly adjacent to the *Wheatland County East* project along US Highway 12, approximately eight miles west of Two Dot. Total project cost is \$1.14 million, consisting of \$1.125 million for the purchase of 50 wetland credit acres and \$15,000 for preliminary engineering for MDT to conduct the legal review of agreements and conservation easements and for Environmental Services to prepare environmental documentation.

The credits will apply possibly to the *Wheatland County Line East* project (CN 4889), *Shawmut West* (CN 4075), and *Checkerboard to Martinsdale* (CN 4803). The actual number of credit acres will vary depending on when these are purchased in the development of those projects.

Commissioner Howlett moved to accept staff recommendations to approve the addition of the wetland credit purchase project to the program; Commissioner Espy seconded the motion. The motion passed unanimously.

## **Agenda item 3: Culvert Replacement**

### *Culvert-NE of Miles City-Glendive District*

Straehl said MDT is requesting commission approval to replace an existing culvert on Interstate 94 located at reference post 141.74 in the Glendive district.

The culvert has a bow in it and is showing signs of movement. It's deemed by those who inspected it that something needs to be done in a fairly expeditious manner. The project will be tied to the *Miles City E&W* (UPN 5916) overlay project for construction.

MDT proposes using Interstate Maintenance (IM) funds for the project. The proposed project's total estimated cost is \$565,000, including \$15,000 for preliminary engineering, \$50,000 for construction engineering and \$500,000 for construction.

In order to maintain fiscal constraint, the Glendive District is proposing to move the *Fallon-NE* project (UPN # 5719) from FY 2007 into FY 2008.

Commissioner Espy moved to accept staff recommendations to approve adding the projects presented to the respective programs; Commissioner Griffith seconded the motion.

Commissioner Espy said this is something that the department decided to do to be certain we don't run into the same effect that we'd had in our district before, and now a second culvert in the Billings district. I understand it's the same type of a culvert, and the state is inspecting many of the culverts now and will be marking these so that they are replaced.

Currie asked Frazier if we had exhausted all remedy in terms of bracing the culvert. Frazier said we have braced it but still believe it necessary to expedite the replacement. Currie asked about the time frame for the replacement, and Straehl said it would occur in 2007.

Currie asked if we had completed the survey of this design of culvert elsewhere on the interstate...do we know if we have very large potential for natural problems here? Frazier said we have 14 other culverts in eastern Montana that have the same type of design. We are going to be examining those this summer. Through the consultant selection board, we have selected a structural consultant to come and train our people about these pipes this summer.

Lynch asked if we've visited other states and areas that have used this culvert to see what they're doing. Frazier said I've discussed this with the chief engineers from other states at the AASHTO meeting; I also sent them the information. Nebraska has none; South Dakota has one; North Dakota has zero; Wyoming has none for similar soil conditions. I've not had a response from Idaho. We appear to be the only state that has this particular design, built in the 1960s. We've had three fail in the last year. The last one went without warning; when we inspected it, it looked good.

Chairman Kennedy asked if this 14 was out of the 200 we talked about last time. Frazier confirmed we have 14 of this exact design on I 90 and I 94 that we've identified. Chairman Kennedy asked if it was a structural problem or the way it was designed. Frazier said we have several theories, but we're hiring an expert. Chairman Kennedy said it sounds better to replace the 14, rather than 200. Frazier said Great Falls district has 2, one on highway 200, different design but similar issues; Missoula district has identified one near St. Regis, Butte district has many large, multi-plate culverts south of Dillon, most of those appear to be in good shape.

Commissioner Griffith asked if soil condition is a contributing factor. Frazier said that is one of the theories, that some of the soils are corrosive to zinc and steel. Some of it might just be the design and shape of the culvert. They discontinued use of it nationwide in 1972.

Frazier said the most plausible explanation we have for the most recent culvert failure at Hysham is that the median filled up with water, caused the soil hydrostatic pressure and collapsed the pipe. If you look at the pipe, it's still intact. Halfway across the roadway, it collapsed right in the median area where the water was concentrated.

The motion passed unanimously.

Agenda item 4: Adding mileage to the state maintenance system

Shiloh Road-Zoo Drive – Billings

Straehl said staff is requesting that the commission approve adding 0.235 miles to the sate maintenance system. This particular stretch of road is one that our maintenance forces have to cross over regardless because we have maintenance jurisdiction on either side. Informally and through local agreement, we have been maintaining this stretch of road since the Shiloh interchange opened in 2000. Billings and Yellowstone County have requested that MDT continue to maintain this segment. MDT's maintenance administrator and deputy director have concurred that this would be a logical approach since we pass over the stretch of road anyway. It's located on Shiloh Road between the intersection of Zoo Drive and the entrance to Zoo Montana (urban route 1031), between reference posts 4.298 and 4.533.

In order to make this official, the commission must take action according to MCA 60-2-128, which states "the commission shall designate the public highways that are to be included on the state maintenance system."

	Beginning RP	Ending RP	Total miles
<b>Proposed addition</b>	<b>RP 4.298</b>	<b>RP 4.533</b>	<b>0.235</b>
Existing Shiloh Road (U-1031) on state maintenance system	RP 4.533	RP 5.352	0.771
Proposed state-maintained portion of Shiloh Rd	RP 4.298	RP 5.352	1.006

Commissioner Howlett moved to accept staff recommendations to approve the addition of the segment of Shiloh Road (U-1031) from reference post 4.298 to reference post 4.533 to the state maintenance system; Commissioner Espy seconded the motion. The motion passed unanimously.

### **Follow-up question**

Chairman Kennedy said the reconstruction project on Shiloh Road is going to begin at Zoo Drive and will extend north to Park Hill Drive, almost to St. Johns Nursing Home. The city of Billings, St. Johns, and private developers have put together the last segment, and that is already constructed at this time. My question is about the maintenance of Shiloh Road.

=> I would like to staff to look at this and come back to us.

Shiloh Road is a State Urban Route. The MPO has prioritized this project, we have earmark dollars, we have urban dollars, we have the county, the city, the state...everybody working on this road. As we starting discussing roundabouts, intersections, lighting, landscaping, business ingress and egress, it all comes back to the decision-making body, which is MDT staff bringing recommendations to the Transportation Commission to approve anything on that road. So the question I have is why doesn't the decision-making entity for the road also carry out the maintenance? The city of Billings would like to have complete ownership of the road so they can make all the decisions for the road.

Currie said I don't think there's a clean answer to the question. The only thought I have on it is we're the highway authority with the responsibility to manage transportation Federal-aid dollars. In order to do that, we are responsible for Federal-aid and State system designation. Shiloh Road is a federal-aid highway on the state designated system and receives monies that fall under the umbrella of Title 23, which MDT and the Transportation Commission are responsible for. That's why the decision-making falls where it does. If it were local money being used, it wouldn't necessarily be the same deal although standards would still have to be met. Right now, the law says the commission has to approve all work on a Federal-aid system, but we all know when a local entity does its own work, the approval process is pretty perfunctory as long as the standards are reviewed by the chief engineer.

Straehl added we run into this quite a lot with the systems impact process. If we have maintenance jurisdiction over the route, we then issue the permits for accesses. As a state agency, we have a lot more control over the design that developers are proposing for those accesses. Even when we don't have direct maintenance authority over a route where a developer is seeking an access, we have a stewardship responsibility over that route. We use effect that stewardship responsibility through the local governments to try and ensure that standards are met.

Right now, the project is being planned and it's full bore federal, by full bore we mean that all federal considerations must be met. So, every environmental meeting, every meeting with the public, every time something comes up as an issue, it has to be dealt with, it has to be disclosed, and there has to be a package of actions that are taken that respect that entire huge process. And so, the roundabouts are coming out of this process, the request for landscaping is coming out of this process. In order to use Federal-aid, you've got to use the process. And you've got to make sure that what happens in the process is respected when the project is built. If the city or county have maintenance after it's constructed, it's going to be a little bit shadowy in terms of issuing additional access permits, unless it's access-controlled and then it's right back to the commission: it's a cooperative process between the state, the local government and the community.

Commissioner Howlett said I understand the necessity of the federal process in the construction project, but what's to preclude a project being completed and given to the city. Why do we have to hook this up to a lifetime of maintenance if the city is willing to do it? Straehl said they often are; there are lots of urban routes that are not maintained by us after they're constructed.

Lynch said Commissioner Howlett touched on something that's going on...we need to recognize that a lot of communities get earmarks or federal funding, which comes through

the MDT and are on system. Your [commission] approval doesn't automatically mean that the state is going to have to continually maintain those roadways forever. I suspect that's what we're dealing with here is we received an earmark for a roadway that we don't have any maintenance responsibility on, but since it is an earmark, it does need to go through our system. That's where our involvement comes in.

Chairman Kennedy said I bring it up because we will probably be receiving a letter from both the city and Yellowstone County asking the state to take the maintenance on the whole road.

Currie said we are looking at the possibility of submitting legislation to allow that ownership issue to be resolved, specifically because of this project. Secondly, Shiloh Road was a locally-driven earmark; that was generated at the local level. I don't know that the state ought to be held responsible to accept maintenance for improvements on routes that are improved by local initiative.

Duman said with very little exception, most Federal-aid money flows through MDT. One of the many requirements that go along with that is to maintain that physical improvement after those capital funds are used. Now, that doesn't mean they can't pass that responsibility down the line. But, in the end, it comes back to MDT to ensure. The other issue is the jurisdictional authority to operate and maintain that system, and that's a legal issue.

Commissioner Howlett said I'm in concurrence with Mr. Currie's observation on a locally driven initiative becoming the state's responsibility. Based on the statement about maintenance after the capital improvements, how then do we prorate that portion when we turn over the maintenance to the city or county. In thinking about the size of state government, and thinking about our local capacity to do the job, and having some source of revenue to support that job without increasing the size of the state, it seems that there are several things that need to be considered. It doesn't seem like an impossible situation. I would like to see us begin to think about how we can convey, whether through legislation or some other means, that gets us to a point that the city feels like they can say something because it's within their confines, but where MDT doesn't feel like it's being asked to participate in something that it didn't initiate.

Chairman Kennedy said this discussion leads to another statewide discussion that was raised at the MACO district meeting by the county road supervisors and county commissioners, about gas tax dollars. The amount that the local governments are getting has been frozen for the last six or eight years. It's not just the state that's struggling to maintain roads, the counties and cities are struggling as well. Is there another revenue source out there we should be tapping into, perhaps even a gas tax increase?

Currie said part of the problem is institutional knowledge at the county level doesn't last very long because there's such turnover. It wasn't very long ago that the counties were relieved of the requirement to maintain secondary highways. That had a value of almost \$15 million per year. There was no decrease in the statutory gas tax allocation, so this was a windfall to the counties. Most of the county commissioners that were around when we negotiated that are gone now. The counties have not stayed static in terms of the amount of money available to maintain local roads because that burden has been taken off them.

Currie – another quick comment: one of the tasks I've been given is to make sure the highway state special revenue fund stays solvent for the foreseeable future. Nobody wants a gas tax increase in the state, whether it is done at the local level or at the state level. That's a very delicate balance, I can tell you, right now we are projecting to keep the fund solvent through 2013 but every few months that is questionable depending on what happens. Right today, we go sometimes three and four days where our cash in our account is negative. We may be borrowing money this summer just to pay our bills. It's a cash flow thing, but it's indicative of how lean that fund is running. When the counties talk about wanting to change that statutory distribution, which would have to be done by the legislature, even if you take one penny's worth equivalent, that's about \$6 million a year. That'll break the fund in almost no time at all and then you're going to be looking at a fuel tax increase.

Chairman Kennedy said Gary Larson and Wayne Noem will be doing a presentation on secondary roads at the MACo annual meeting. We are going to try and keep that going every year so the brand new commissioners can understand where we're at. I'd like to invite the two of you [Currie and Lynch] to come and speak on where we are with funding so people understand that; where the balance is, how much comes in, and things like that. Once people have that knowledge, I think they can start to see that you can take money away from one place, you've got to decide which projects you're not going to do. And of course, no one is willing to give up a project.

I know we got off subject, but I wanted to have a discussion about this.

### **Agenda item 5: CMAQ project – Missoula**

#### *Madison Bridge Trail Project*

Straehl said in this agenda item, staff is requesting commission approval for two priorities in the Madison Bridge Trail project Missoula.

*Priority I* will provide a more direct trail connection between Missoula's Riverfront Trail and the University of Montana and a second direct connection between campus sidewalks and the Riverfront. This portion of the project will construct an eight-foot wide compacted gravel trail running parallel to the roadway. The trail begins at the Riverfront under the Madison Street Bridge then continues in a southeast direction for 512 linear feet. The trail ends with 100 square feet of sidewalk to tie into the parking area at the intersection of Maurice and 5<sup>th</sup> Street. From there, trail users can cross 5<sup>th</sup> street (U-8114W) and enter campus. *Priority I* is primarily on MDT right-of-way.

*Priority II* involves widening the existing sidewalk immediately west of the Adams Student Recreation Center. The existing sidewalk is narrow and consequently, has many pedestrian/cyclist conflicts. The proposed project will widen 212 linear feet of the existing sidewalk by another twelve feet with a curb and gutter edge where it meets with the asphalt roadway. Two ADA curb ramps will be included for wheelchair accessibility.

The funding source for this is CMAQ dollars that Missoula receives by virtue of their air quality status. It's being developed as if it were a CTEP project. It is adjacent to 5<sup>th</sup> avenue, which is an urban route, so the commission needs to approve the funding. The development was through the CTEP process, and the request is for CMAQ funding in the amount of \$79,000 which includes \$7,171 for construction engineering and \$71,829 for construction. MDT will administer the project throughout. We are asking for money for the construction and construction engineering.

Commissioner Howlett moved to accept staff recommendations to approve the addition of the *Madison Bridge Trail Project*, a CMAQ project in Missoula, to the program; Commissioner Griffith seconded the motion. The motion passed unanimously.

### **Follow-up discussion: Arthur Avenue – Missoula**

Commissioner Howlett said at a future meeting, I would like to have more of a discussion on what I've been reading in the paper about US 12 [in Missoula] and widening that so truck traffic can go by the university. I think that makes absolutely no sense. I would like to have a discussion here because I'm just dumbfounded that it was even brought forward as a concept.

Lynch said that process and project predates both you and me. The project was requested by the University of Montana. They own property on both sides. It was also brought by the Metropolitan Planning Organization – city of Missoula, to look at upgrades on that roadway. Right now, we are at the tail ends of doing an environmental document to address what type of roadway is actually going to end up being there. The EA public comment period is going to be wrapping up here shortly, after which the environmental document will come through with a recommendation. This involves an agreement with the MPO, the city of Missoula, and the University of Montana; of course it deals with our system, so we are also involved in the process. As far as us recommending a road to increase truck traffic, that's really not what's taking place. I know comments have been made to that effect, but it's really not what we are doing. It's the process the state has to go through in order to determine what type of

alternative, or what the roadway is going to be, or if it's going to be anything. It could be that the final recommendation is that nothing is done.

Commissioner Howlett said I have students, people who work there, activists, and others who are asking why this is going forward. My response is I don't know. I want to have more of a discussion because I represent those people at the policy level. There's an awful lot of pedestrian and bicycle traffic in the university area. In fact, Missoula just received some kind of an award for being an environmentally friendly place to work because of the number of people that bicycle and walk to work. As commissioner from that district, I would like to have some idea of those projects that are going on and the origin of those projects. I'm going to take a position on this at some point. It's my responsibility.

Lynch said we have no objection to that. We need to understand that, because of the environmental process underway, we cannot predetermine the outcome. We didn't bring this project to the city of Missoula; this project was brought to the Department of Transportation. We have an obligation to walk through the process, which is where we're at right now. I know that people commented at the public hearing about the same issues you raised; those comments will be met and will be addressed and incorporated into the environmental document. There isn't a decision yet as to what the road will look like. Unfortunately, in this process, in order to get the thing started, we have to start with some baseline, and that's called a preferred alternative. It's a discussion point. The consulting company that's doing this project will come to use with their recommendation based on this input. It could be that design, it could be a different design, it could be a recommendation we don't build it at all.

Frazier referred to the map and the one-way couplet that comes up Maurice, and goes across the Madison Street Bridge. That is part of US Highway 12. The geometrics of the corner at Maurice [and Fifth Street] are a lot less than desirable, especially since it is a highway, and there is truck traffic that does go through there. So we do have truck traffic currently going through the university campus. I believe the original intent was to try and develop an alternative to get the trucks out of the university campus.

Commissioner Howlett said I would like this on a future agenda, so that when it comes time to pass a vote, I have some sense of where this came from and how it got here.

Lynch said that's a great idea. We do these environmental processes in all the districts, and, when we get to that point, I'd like to include the commission in what the recommendation is, and what some of the concerns and issues have been during the NEPA process.

### **Agenda item 6: Speed study**

#### *North 19<sup>th</sup> Avenue – Bozeman*

Frazier said you have before you the results of a speed study done on North 19<sup>th</sup> Avenue in Bozeman. The attached e-mail demonstrates concurrence from the city. As shown on the map, the study began at the North 19<sup>th</sup> interchange with I 90 interchange and extended south to Durston Road. Currently, we have a mixture of 35 and 55 and 45 mph there; it is not a continuous speed limit. The original speed limit was set when North 19<sup>th</sup> was built in the late 1990s, when it was a rural area with farm fields. That has changed in the last couple years, it has almost become an urban environment. The recommendation is to make that a continuous 40 mph limit.

=> Chairman Kennedy asked Frazier to thank staff for being so thorough and for communicating with the local governments to make sure they concur with the recommendation.

Commissioner Griffith moved to accept staff recommendations to approve a 40 mph speed zone on North 19<sup>th</sup> Avenue in Bozeman, from the intersection with Durston Road to Springhill Road; Commissioner Espy seconded the motion. The motion passed unanimously.

### **Agenda item 7: Access control resolution**

*Turn Bay – West Three Forks Interchange*

Project STPP-NH 8-4(51)1-7 in Broadwater County

Frazier said you have before you a request for an access control resolution near the Three Forks interchange. This was brought up as a safety issue where we can install turn bays, and traffic has increased to the point we need to be careful where we place intersections. This access control resolution supports the development of that project.

Commissioner Griffith moved to accept staff recommendations to approve the access control resolution for US Highway 287 within the parameters of the *Turn Bay – West Three Forks Interchange* project [STPP-NH 8-4(51)1-7 in Broadwater County; right-of-way project 4435-051-000]; Commissioner Espy seconded the motion. The motion passed unanimously.

### **Agenda item 8: Access control resolution**

*2000-Safety Imp-8km NW Red Lodge*

Project STPHS 78-1(15)5 in Carbon County

Frazier said you have before you a request for an access control resolution on Highway 78, as shown in exhibit A. Staff did quite an extensive public involvement process to develop a corridor plan. I believe I showed that plan as an example of what I would like us to do on other corridors where we need to implement that.

Commissioner Kottel moved to accept staff recommendations to approve the access control resolution for MT Highway 78 within the parameters of the *2000-Safety Imp-8km NW Red Lodge* project [STPHS 78-1(15)5 in Carbon County; right-of-way project 4720-015-000]; Commissioner Griffith seconded the motion. The motion passed unanimously.

Commissioner Griffith said on a related issue in that area, I was contacted by one of the business owners up at Cooke City regarding a speed zone study in their area. I asked them to send a letter to the commission requesting a study. Currie said that's not under our jurisdiction; National Park Service has jurisdiction from the boundary of the park at Silver Gate all the way through Cooke City into Wyoming, down to Chief Joseph junction, all the way to the Montana border. Lynch said what we might be able to do is compile some information for them when we get the letter. Once we see the letter, we'll have a better idea of how to help them.

### **Agenda item 9: Access Control Exceptions Committee roles and responsibilities**

*US 93 Corridor Preservation* (on project *Evaro to Polson* [NH 0002(418)])

Frazier said this agenda item is the Access Control Exceptions Committee roles and responsibilities for the US 93 corridor preservation from Evaro to Polson. We negotiated a memorandum of agreement with the tribe, federal highways, and the Department of Transportation on how we're going to design that highway and how we're going to work such items as access control. There is already a resolution designating that. When we negotiated the MOU, we established a process for handling situations where someone doesn't agree with where the accesses are. This formalizes the process and provides an appeals process so that if someone disagrees with the decision, they can elevate it.

Commissioner Howlett said I was hoping some members of the tribal council were going to be here today. They were unaware this was being presented until a couple of days ago. I am not comfortable with this, because members of the tribal government have expressed grave concern to me about the whole issue of access, and some things that have been done by this committee that they think are beyond the scope of this committee, and I think we need to hear what the tribes concerns are. This says that it provides for the participation of the tribe, but I would be much more comfortable that we have a letter from the tribal chairman expressing support for this. I request that we defer this item.



Currie asked Frazier if this was part of the original MOU. Frazier said it was, and this has also been reviewed by the POG. Commissioner Howlett said I don't feel the tribal council is comfortable with this. I think what was brought to the POG was the perception of the roles and responsibilities of the TDC, and how those were outside what they thought that was supposed to be. This may very well correct it, but I don't know that they're comfortable it. Two or three members of the council plus the tribal attorney sit on the POG. Commissioner Howlett said what I want is for the tribal government to endorse this.

Lynch said I don't think we would be bringing this to you if we didn't think this wasn't an approved document by the Salish Kootenai and negotiated in the MOA and the MOU. However, if you like, we can get more clarification on this. We certainly wouldn't want to be bringing to you something that is not agreed upon through the MOU and MOA process which the tribal chairman has signed.

Commissioner Kottel said there are so many questions on this. For example, who chairs it, who sets agendas, how long does someone sit? It says "one voting representative when appropriate" but then doesn't define what "appropriate" means. Later it says if it's within the jurisdiction of a county they of course have a representative, but are there other times when it would be appropriate for a county representative to attend? It doesn't say. It says that the "entity designates the representative" but later says if the representative can't attend, then the representative can designate another representative. Is that really what you meant, or did you mean the entity can designate another representative. So if I'm the representative and I can't attend, can I send my brother-in-law? Maybe this isn't meant to cover all that, and there's something else out there that's more specific.

Lynch said this is all coming out of the MOU and MOU that was negotiated with the Salish Kootenai and the department of transportation dealing with access on their reservation. But, your points are well taken. So, let's get these questions answered and bring this back at the next meeting.

Commissioner Howlett moved to table this item until the next meeting; Commissioner Kottel seconded the motion.

Lynch said the next POG meeting is May 31 so we can address this then.

The motion passed unanimously.

### **Agenda item 10: Letting lists**

Frazier said I have letting lists for the months of May, June, July, August and September. This represents the remainder of our federal funding for this fiscal year. We have had to delay some projects because of funding issues.

Commissioner Espy moved to accept staff recommendations to approve the letting lists presented for May, June, July, August and September 2006; Commissioner Griffith seconded the motion.

Commissioner Griffith asked if we could discuss the projects we've taken out. Lynch clarified that we haven't cancelled projects; they are just postponed. Commissioner Griffith said he wanted a list of what we've had to postpone, if possible, before the end of the meeting. Commissioner Kottel asked about the domino effect. Lynch said we spend every federal dollar we have, and we hope additional monies in the form of "grab bag" funding will be made available to the state of Montana. We will move projects in relation to the money we have available. An example is *Bowman's Corner*: we moved it to October, and now it's moved back into September. Every month we look at the projects, what's coming, what additional costs have been incurred through change orders, which projects have come in under budget, and make adjustments accordingly. We'll look at this together this fall during the development of the Tentative Construction Program (TCP). Lynch referred to the increase in construction costs versus what we had planned, and the "take downs" from the federal dollars we are receiving.

Currie said we've moved \$56 million worth of projects from this fiscal year into next, based on current estimates. This will affect next year's TCP. In addition, we have some issues with the bonded projects, which we'll talk about more later.

The motion passed unanimously.

### **Agenda item 11: Certificates of completion for March 2006**

Commissioner Griffith moved to accept staff recommendations to approve the certificates of completion presented for March 2006; Commissioner Espy seconded the motion. The motion passed unanimously.

### **Agenda item 12: Project change orders**

*March 2006 = \$601,332.07*

Frazier said you have before you change orders for March. If you look at the totals, you can see that three districts had none, Butte district is saving us money, and the only change orders we had were in the Missoula district. The largest of those change orders was for \$485,000 and this is for an item with force account work. We set up an item in the contract for when we are reconstructing and find old gas stations to allow for clean-up work. We set it up on force account basis because we do not know the final quantities to do the clean-up work. Commissioner Griffith asked if we can participate in the 1c/gallon petroleum tax to get reimbursed for such clean-up work. Burch said MDT's environmental services does go after reimbursement for these underground storage tanks, and do get a percentage back.

Commissioner Espy said when they reconstructed US 212 through Broadus, there was a service station that had been abandoned, and DEQ had DOT dig up the tanks and they placed a lien against the man who did business there.

Lynch said I've had a little bit of experience with this, and it was my understanding that as long as the tank was registered as an underground storage tank with the Department of Environmental Quality (DEQ), you qualified for reimbursement. If the tank was not registered, and you had the opportunity to disclose it and failed to do that, you would not receive reimbursement from DEQ. I think they have a section that deals with tanks that no one knew were there. The person ultimately responsible for contaminated soil is the person who created it. If someone else deals with it, they may be entitled to reimbursement.

Commissioner Griffith said you can't pass along environmental liability with a purchase. Reardon said typically what happens on our projects is we don't know the tanks are there. It's a laborious process to make sure you capture the plume. We do run into this periodically. Most of these stations were abandoned years ago, and the owners have long since disappeared. If you find contamination in the soil samples, you have to get the tank out of there. If you can find somebody to pass the costs along to, you do, but once you own the ground, you've got ties.

Commissioner Griffith moved to accept staff recommendations to approve the change orders for March 2006; Commissioner Kottel seconded the motion. The motion passed unanimously.

### **Communication with local government**

*Ted Coffman, Madison County Commission Chairman*

Ted Coffman said during the break I put a letter in front of you. It's pretty self-explanatory. We have Varney Road in Ennis, actually Secondary 249. Jason Giard, Jeff Ebert's predecessor, made some public statements about what he would help do with Varney Road. I believe Loran Frazier was there; he was a staff person in Butte. He may be able to attest to what Jason said.

We have an MDT project in Madison County, starting in Ennis and going about six miles to the southwest. Proposed work consists of a mill, overlay, and a seal. MDT has worked graciously with Madison County to get the millings. We propose to use those going up to

the national fish hatchery, a little bit south of the Varney Road. We bid several projects that we would like to do and try to tie in with the contractor that's doing the MDT work. We have some bids on the Varney Road, and some other bids that Madison County can't do by ourselves. When I wrote this letter, we hadn't opened the bids yet. The price, for a two-inch overlay and chip-seal, came out to about \$355,000 for 4.5 miles of road. I just noticed in your bid-opening downstairs that they're going to do 2.5 miles of road up by US 93 for \$1.2 million. Now's the best time to get the best bang for the buck. I've talked to Director Lynch and Chairman Kennedy about this. I'd like for you to do the whole thing but I understand that your money is just as tight as ours. If we could 50 percent matching funds to help us do this road; it's a very highly traveled road. In the fall, the hunters use it, there are three fishing access sites on the Madison River that are accessed by this road. Just looking for a little help and would be glad to answer any questions.

Frazier said he recalled the meeting was in September 1999. It was just before I left to go to Missoula.

Chairman Kennedy asked for clarification about the \$355,000. Coffman said that's our bid. Chairman Kennedy asked if they had the money to do the bid. Coffman said they were still looking for money. We had several projects, and the bids ranged from a high of \$638,000 to the low bidder was \$355,450 and that person is the one that's doing the MDT job. We are trying to take advantage of economies of scale. We told them at a pre-bid that we're not sure we can do this project.

Lynch said this road is eligible for pavement preservation funds. If we do have money available in that district for pavement preservation without hurting another project, we would be willing to do that. I think the request makes good sense, by taking advantage of an asphalt plant and construction operation already set up in the close vicinity. They're asking us to pay for half of that; I think that's something we can do, if you have concurrence with that. We are going to have to spend the money eventually on that road, so it makes good sense to spend it now. No formal commission action is required on this item, but we appreciate your direction. We are not circumventing the secondary roads priorities.

Commissioner Griffith said it makes sense and it is a good project for that area.

Commissioner Howlett said I would be in concurrence. Commissioner Espy said she would be in favor of it.

Coffman said we are not asking MDT to take over the maintenance of the road.

Chairman Kennedy said Ted has been very persistent on this. He has gone through all the proper channels. We appreciate that.

*Commissioner Ed Tinsley, Lewis & Clark County*

Commissioner Murray and I came to say hello and welcome to Lewis & Clark County, and thanks for all your help in the past. We have several new things happening: the South [Helena] Interchange, hopefully Custer eventually, US 287 is looking more and more like it might actually occur, and 435 is happening now. Things are happening all over Lewis & Clark County; it's a growing county. We work with Mick Johnson; whenever we call, he's on the phone or e-mail right away. Director Lynch is the same way. We appreciate it. Commissioner Varone is in Yellowstone County at the Governor's DES conference.

Commissioner Griffith asked for an update on the South Helena interchange. Lynch said it's going to bid in June 2007. It's truly been a cooperative venture between the private sector, a city and two counties.

Tinsley said we were sad to see our old friend, the Craig Bridge go, it has found a final resting place. If you want to go see it, it is in a staging area at the old State Nursery on the west side of town. It was quite a move. You never know how many overhead power lines there are until you see one of these moves take place. There was one stretch on Sierra Road where there were about 47 crossings that required moving the power lines. It was just

amazing to watch these behemoths roll through the valley. The new bridge is very nice and will handle all the recreation traffic.

Ron Trahan, Salish Kootenai, thanked the commission for the speed limit changes on US 93. I remind people who complain about the construction that this time next year they'll have a good road to drive. There is some inconvenience, but overall, the communication has been good. There are a few things we need to get going there, such as access roads, minor things we've got to look at. All in all, it's going good.

Chairman Kennedy said we tabled the item entitled Access Control Exceptions Committee roles and responsibilities *US 93 Corridor Preservation* and will take it up at Red Lodge.

Kristina Davis, Senator Max Baucus' office said we are fighting very hard for the Going-to-the-Sun monies. I happened to be in DC when we got that language change approved in April. The senator is confident that the change will move forward as we've anticipated. He is holding approval of the new national director of transportation in hostage until this is addressed. I will be at the opening of the Beartooth and am looking forward to that.

Charlene Snody, Senator Burns' office, said I've enjoyed the discussion and am learning a lot.

### **Agenda item 13: Liquidated damages**

\$5,802 assessed on project SFCS 419-1(11)0 *Jct MT 78 – SW* (Riverside Contracting of Missoula)

Frazier said this is for a state-funded project on MT 78. Riverside Contracting of Missoula overran contract time by 6 days. Riverside Contracting signed the Contractors Final Inspection on April 18, 2006 agreeing to the amount of liquidated damages on this project. We recommend assessing 6 days at \$967.00 per day for a total of \$5,802.

The commission took no action, therefore the liquidated damages will stand in the amount recommended.

### **Special presentation**

Commissioner Griffith presented Loran Frazier with a clock as a gag gift.

### **Agenda item 14: Commission discussion**

#### *Beartooth Highway*

Lynch said the snow has been removed from the Montana side of the Beartooth. We are waiting for the Park Service to open the Wyoming side. The Beartooth highway will open all the way to Cooke City, barring unforeseen snowfall. The Beartooth is having their scheduled Memorial Day opening this year, unlike last year, when they could not. As you know, we did open the Beartooth highway last October after the construction, until the traditional closing for the winter.

We have been up to inspect the repairs this spring. We feel we got an exceptional job by JTL. I observed a large rock about the size of a volleyball wedged between one of the chain link fences. What we did with some of the rock outcroppings, was to overlap the fencing which is similar to but much stronger than chain link fence, by almost two feet. Then, to make sure the rock couldn't come through that, we had a larger fence on the outside. You wonder if it really needed all that, but we actually saw a rock between the two layers of fence...what kept the rock from hitting the road was that additional fence. We are pleased with how the road overwintered. We still have a little work to do, we have some repairs to do on the pavement itself, like a seal and coat and striping. The city of Red Lodge has great festivities planned for Memorial Day weekend. Chairman Kennedy said it's always a lot of fun.

Commissioner Griffith asked what the status is on getting reimbursed on that project, both from the feds and the money owed to Wyoming. Lynch said although the road qualifies for emergency relief funding, FHWA has not released that money yet. However, we did receive

\$12 million from FHWA Central Federal Lands which was money given to the state of Montana years ago to improve the Beartooth. Whatever wasn't used in Montana was going to be used on the Wyoming side. They do not have a project over there, so we're not holding them up. That's been a real blessing to the state, because without that, we would have been hurt quite a bit. We will refund the money to Wyoming when we receive ER funding, and they understand that.

Commissioner Griffith asked what the final cost is. Frazier said close to \$17 million. Currie said we got \$12 million from Central Federal Lands, \$2 million in quick relief ER funding. Lynch said we also have an earmark that can be used to pay for the Beartooth until ER funding comes.

Duman said there's a huge backlog of ER requests. We only set aside \$100 million a year on the highway program. Congress is trying to pass a supplemental appropriations bill to help clear up that backlog. Until then, there's no money.

#### *Congratulations*

Lynch congratulated Rick Commissioner Griffith and his wife on their celebration of 32 years of marriage last night.

Lynch recognized Commissioner Chairman Kennedy for the appointment he recently received from Senator Baucus to sit on a special committee to look at different revenue opportunities to fund the national highway system. Kathy Ruffalo of Wyoming was also appointed to the committee; she worked on the last three reauthorizations for the federal transportation bill. We feel very fortunate that Bill and Kathy have been appointed. That's a good thing for Montana.

#### *Highway 93 Evaro – Polson*

Lynch said this stretch of projects was initially estimated to cost somewhere around \$130 million. We bonded those projects. History has proven that was a very smart thing to do. But, because of the increase in construction costs, we are now looking at how to finish the projects. I will turn this portion of the discussion over to Jim Currie.

Currie said we bonded \$130 million worth of bonding authority for these projects, which gave us \$133 million worth of proceeds that we could actually put toward this project. When we initially did the engineers' estimates for these projects, even given building in an inflation factor, we thought it would be enough. We have now let all but three of the projects. Based on the inflation we've seen, particularly this last year, we are going to have a significant shortfall in what these projects are going to cost versus the proceeds we have from the bonding. The shortfall is currently estimated at \$31 million. Of the three projects, one is scheduled to be let in December, the second will be let in either January or February, and the final one will, I think, be let next fall. We will have to deal with the funding shortfall at the Redbook meeting this fall. We will have some options for you to consider, but could be looking at the following: further bonding, taking it "off the top" and treating it as a statewide issue, or push projects out. I tell you this so that you can be thinking about some of the alternatives between now and this fall.

Commissioner Howlett asked if this included the Ninepipes area, which was to be addressed in the supplemental EIS. Currie said it does not. That's one of the problems with this shortfall. We thought we'd have bonding in our back pocket for this Ninepipe–Ronan segment we still need to do. So that's going to be another dilemma we'll have to face. Commissioner Howlett said it's likely to be a very expensive project because of all the wetlands and the threatened and endangered species.

#### *DBE program*

Lynch said a decision by the 9<sup>th</sup> Circuit Court has affected all the states' DBE programs. Any state that had a DBE program was basically ordered you don't have one. The states have to come up with a program. We are working on what our state's program will be. The reason I bring this up is, even without the requirement out there, the Montana contractors exceeded our goal which was around 5.2 percent. Currently Montana contractors are around

8 percent, without a requirement. The contractors are doing a great job of maintaining minority and Native Americans in their employ. We need to commend them for that.

*Secondary roads impacted by oil production*

Commissioner Espy said the eastern counties, where more oil is being found, are having a terrible time with secondary roads. The trucks are so heavy, and they drive too fast. Those commissioners are being really hurt with this. They don't have the finances to improve the roads, and the oil companies are not cooperating with us. The way the incentive tax is being handled, evidently the counties don't get revenue back from oil development for many months – a tax holiday. They are desperate for help.

Chairman Kennedy said it's a catch-22. They don't want to stop production, but the real problem is the roads are being torn up. Can we put the onus back on the companies to help repair the road. Lynch said this is more of a legal question. There is nothing statutorily we can do unless the state is able to prove that the trucks are operating overweight and in violation of state law and causing damages. I suppose we could bring action against them for damaging a state highway. We understand what's going on in the counties and the secondary highways and some of the county roads. We're also seeing it on our roads too. I think it's important that our MCS operation first of all ensures those trucks are operating legally, that they're not overloaded and they're operating within the speed limit. We also don't receive any additional funding from the increase in oil production. For lack of a better response, I feel your pain. Commissioner Griffith asked if we are putting restrictive speed limits on sensitive roads. Commissioner Espy said they are trying to do that, they are putting that on. Commissioner Espy noted that Montana producers are only getting \$30-37 per barrel where other producers are getting \$70. Wyoming is having the same problem.

Chairman Kennedy asked if the state had anything set up similar to the coal board. Currie said he wasn't aware of anything, and the way the coal trust fund was set up, it's almost impossible to tap.

Lynch said there's a tough balancing act. We need to get the oil out, and it's causing some damage to the roads, but do you restrict the size of weight – which we have the capabilities to do – and not get the oil out? I wish there was some easy answer to that.

Chairman Kennedy suggested the counties go to the legislature and see if there could be oil impact dollars.

**Agenda item 16: Next commission meeting: June 28-29 in Red Lodge**

Chairman Kennedy said the next commission meeting will be in Red Lodge. He asked everyone to be in Billings around 10:30 am or so on the 28<sup>th</sup>, at the MDT building.

Chairman Kennedy said he would like to show everyone the CTEP project currently under construction at Pompey's Pillar, the Shiloh – Bench Boulevard connection, Zimmerman Trail, 8<sup>th</sup> Street West in Laurel, US Highway 212, and a tour of the Beartooth. We will stay overnight at the Pollard. The meeting will be across the street at the Red Lodge Pizza Company.

After our meeting, we will take you back to Billings.

Commissioner Kottel reminded everyone that she had another commitment and wouldn't attend the Red Lodge meeting.

Lynch said he wouldn't be there for June 28; he will be taking his youngest daughter to an orientation at Bozeman University.

*Miscellaneous discussion items*

=> Commissioner Espy asked when we would have the signs up for Pompey's Pillar. An event is scheduled there for July 21. Chairman Kennedy said he would put that all together this week and send it to Lynch.

Commissioner Howlett asked where we were with the veterans sign on the bridge in Ravalli.  
=> Lynch said he would follow-up with that.

*Per diem for conference call participation*

Lynch said, it's up to you individually, but under state statute the \$50 stipend that's paid to commissioners also applies to participation in conference calls. Some state agencies and boards/commissions do, and some don't. => He asked commissioners to get with Lorelle on an individual basis if they'd like that.

**Agenda item 15: Public comment**

*George Littlefield, Great Falls*

George Littlefield, neighborhood council IV in Great Falls, offered the commissioners copies of the information he's put together regarding his effort to get school zone safety improved.

The first step, with the help of State Senator Trudi Schmidt, was to get fines doubled in school zones.

The second step is to get school zones defined in state law, and have relevant safety information inserted into the state driver's manual.

I have the full support of the Cascade county sheriff, the Great Falls police department and the Great Falls mayor. I have asked AARP to include this in their over-55 driver training.

This is about education for the teenagers who are studying to take their drivers manuals. I think the state of Montana has a responsibility to define: one, what is a school zone; and two, what is the minimum appropriate school zone safety signage?

Littlefield asked Lynch if he'd been able to do any follow-up after the last commission meeting. Lynch said we are putting together a comprehensive safety plan for the entire state, which involves OPI, and the information you're proposing would be very important to that plan. He asked Littlefield to give information to Sandy [Straehl]. Have you given it to OPI? Littlefield said yes. He'd been asked to work with Fran Penner-Ray, but she was on vacation. Lynch encouraged Littlefield to continue working with Penner-Ray of OPI.

Lynch said the state statute is confusing because it says it's under the Montana Department of Transportation responsibility, however, for eons it's been operated under the Office of Public Instruction. We can help address this through the comprehensive safety plan. Straehl said David Huff is the champion of the part that has to do with driver's instruction. There is an objective devoted to best practices or standards to do with driver's education across the state, so this would be the exact time to get this into his hands. Lynch added that Mr. Littlefield could participate in this process too.

Littlefield asked if it would be possible to do a PSA on school zone safety. => Lynch said we do PSAs at the start of every school year, and perhaps we could do one that focuses on speed. We would have no problem doing that and have the budget for it.

Commissioner Kottel said, from a professor's point of view, it would be very helpful to provide lecturers with curricular materials, such as a course outlines, overheads, PowerPoint presentations, sample test questions, etc, along with a strong letter asking them to incorporate the information into their coursework. This makes it very easy for them to make the change.

Lynch said it is, and at the last comprehensive safety meeting, that's exactly what was asked of OPI, using law enforcement or the Montana Department of Transportation to put a part in the education process of young drivers, similar to what law enforcement agencies are doing statewide and nationally with the D.A.R.E. program. We're very serious about traffic accidents, injuries, and fatalities in the state of Montana. We're looking at putting those types of programs together. We don't have any problem with that.

Straehl added that we have a new funding source, *Safe Routes to Schools*. A certain percentage of the funding category is dedicated for educational and behavioral training, and this might be eligible.

Littlefield thanked the commission for hearing him.

*Sharon Williams, Dillon*

Sharon Williams, representing Williams Feed and Seed of Dillon, said I am one of the owners. We have five buildings in Dillon and one sister store in Sheridan. Last year, we had a road project come through Dillon. Access control was imposed in Dillon, only on seven buildings on the west side, coming into Dillon. We went to all the public meetings; access control wasn't discussed. The mayor and ex-mayor weren't aware of it. We were told our facilities wouldn't be hurt because the highway would be moving to the east. Someone saw an access control resolution hanging on a board on the courthouse. It was passed by the city of Dillon and the mayor had signed it. Williams discussed the impact access control has had on their buildings, and on the ability of 100-foot fertilizer trucks to access their buildings.

Williams said there were seven buildings in the limited access control area. Five of those seven facilities were taken care of by the Montana Department of Transportation. The scope-of-work document said, "Williamses were going to lose their parking, Williamses need to be reoriented," but no one spoke to my husband and I about these issues. I'm asking today if there is someone who is ethical and who could sit down and explain to us what happened in our community. We didn't ask for the new road, and when it came in, we didn't know this was going to happen, and it was never discussed with Williamses. The meetings started in 1999 and 2000. I know that Bob Fischer came up to me one time and told me he didn't want our trucks out in the road. We are the largest user of fertilizer in our area; we're not a little fly-by-night operation. Williamses has been fighting with the Department of Transportation for two-and-a-half years. We're good people, we're honest people, and we didn't expect to have any of this happen.

They turned C&C sideways, they put a scale in for C&C, and they took parcel 2 (A.L. Gilbert) completely out.

Chairman Kennedy said I will give this back to Director Lynch. Lynch said I would be more than happy to look into what happened from beginning to end in this process.

Williams said we wanted to talk to the commission earlier, and we were told the state didn't want us to go and talk to the commission. Williams said they moved contaminated soil, and we know it was contaminated; that's why we're a thorn.

Lynch asked who in the state told you that they didn't want you to talk to the commission. Williams didn't know but said she would find out.

Commissioner Howlett said I appreciate director Lynch wanting to compile the record. You deserve the truth. You may not agree with what's there, but you deserve to be told the truth. I think the department is trying to take away the mantle that we're just going to ride roughshod over whoever, that we do really care about how our projects impact people, that we really want to be fair with people, and its institutional changes as much as it is anything. There may have been, and I don't know, an opportunity for "old school" – for lack of a better term – ways of dealing with things. I can tell you in the last four years, this commission has been very attentive to the impacts of our projects. I just hope we can find out what went on, and, if something was done, that we have the courage to (inaudible).

Commissioner Kottel said I'm hearing two entirely different things and I hope that when we look into it, we will look at both issues. The first is, do we have a system in which there is adequate notice in terms of public participation and adequate systems that are transparent for the public to participate, and when a proposed limited access plan is disseminated in a broad enough way so that people can look at it and comment in a way that is substantive so that information comes in. Second, whether or not the decision is appropriate. That is entirely different. That is, how are decisions made, what kind of facts are put in, what kind



of participation takes place. That goes to what you [Kevin] were saying, you might not like the decision.

I don't know what the process is, if it's similar to an annexation proceedings, where everyone who is impacted actually receives notice and is formally invited to a meeting, and are noticed in the paper, rather than having to find the information posted somewhere in a public building. If we could look at both of those issues, that would be important to me.

Williams said those who signed right-of-way agreements said afterwards that they knew nothing about limited access control.

Reardon said a couple of facts: Williams Feed retained a very experience trial lawyer from Anaconda to represent them. A lawsuit was filed against this department on the basis of an inverse condemnation claim of behalf of Williams Feed. That went to a jury trial, and I will tell you, we don't go to jury trials around here unless we have a case. That was the second one in twelve years that I've been the chief counsel here. A jury in Beaverhead County heard this case and returned a verdict in favor of the state, that there were zero damages resulting from the conduct of the department. And I think that's important, and I also think it's important that you know, as you delve into this, certainly on the process question I think that's fine, this matter is on appeal to the Montana Supreme Court. So how far you go into this record of this particular proceeding, I think you need to be a little bit cautious.

Williams said the hard evidence, the right-of-way agreements with nearby businesses, were not allowed into evidence in our local court. The judge wouldn't allow it.

Chairman Kennedy thanked Williams for her public comment.

Chairman Kennedy recessed for lunch at 11:57 am and set 1:30 pm as the time to reconvene. At 1:30 pm, we have the discussion on outdoor advertising. There will be some public comment, but I'm going to ask that, with a limited period of time, there be no back-and-forth discussion with those making the comments. We've already had a public hearing; we are not redoing the hearing.

### **Agenda item 1: Outdoor advertising – proposed changes to administrative rules**

Chairman Kennedy said a public hearing was held March 17. I'm going to ask Director Lynch to go over the proceedings to this point, and for the staff recommendation. We are going to limit comment time to two minutes. This is not a hearing; this is public comment time. You will have an opportunity to make public comment on the recommendation that comes forward today.

Lynch said months ago, I think back in February, the commission was asked to appoint a hearings examiner to listen to some possible rule changes in the outdoor advertising regulations that the Montana Department of Transportation administers. That public hearing was held on March 17, St. Patrick's Day. Several people at the hearing commented in favor of the new rules; several commented not in favor of the new rules. Both sides talked about safety. Overall, the hearing was run very well, and a lot of comments were made. I have read the hearings examiner's report, and it was forwarded on to you [the commission]. Since the hearing, several of us have received further public comment on the rules. About 95 percent of the comments were relative to one rule: variable message signs.

Lynch said the department recommends you adopt the rules with two exceptions (shown in bold below):

- Rule 18.6.205 (rule 2) *recognition of sponsors and benefactors*
  - We want to make sure it is very clear that this recognition of sponsors, benefactors and support groups applies to non-profit sign owners. We recommend clarifying language to read “An on-premise **non-profit** sign owner may (1) recognize the name of a sponsor, benefactor or support group.”

- Under (f) we recommend adding a definition of what a non-profit is: “**A non-profit owner will include schools, churches, and other local governments.**”

Commissioner Kottel asked why non-profits weren't defined as 501C(3) organization; you limited it to schools, churches and other local government entities. Reardon said this rule was proposed in response to donated signs primarily that are going to high schools and colleges and so forth, so we didn't want to expand that beyond churches and schools, frankly, and local governments that for one reason or another especially in smaller communities, can't necessarily afford to put up a sign. Lynch clarified that this would disallow someone from forming a non-profit company just so they could put up a sign.

- Rule 18.6.232 *Commercial electronic variable message signs*

Lynch said the original rule states, “Off-premise commercial electronic variable message signs (CMS), regardless of the message, are prohibited in controlled areas.” That's the existing rule. As I said before, we had a very good public hearing, we heard an awful lot of public comment at that public hearing; we heard pros and cons, we've received a tremendous amount of letters and phone calls on this particular rule change. Changing this rule is very different than what was proposed in the other rules. The other rules were either cleaning up language or shifting words to make it more concise as to what the rules really intended to do. The change in 18.6.232 that was presented at the public hearing is a complete, entire change of an intent of that rule.

With the significant public comment we've received, I'm recommending that we do not change that rule; we leave the rule as stated. Although it is within the jurisdiction of the commission, effecting a change would be a significant cultural change for the entire state. We believe a decision of this magnitude would best be left for the legislature to make.

Chairman Kennedy walked through the other rules up for consideration:

18.6.202 DEFINITIONS (1) Remains as is.

(2) “Commercial electronic variable message signs”(CMS) means electrical or electromechanical signs on which messages can be changed remotely through hard wire or wireless communications and have the capability to present a large amount of text and/or symbolic imagery. contain, include, or are illuminated by any flashing, intermittent, or moving light or lights, producing the illusion of movement by means of electronic, electrical or electro-mechanical input Other names for CMS are “variable message signs”(VMS), “dynamic message signs” (DMS), “smart boards” (SBS), “tri-vision” (TVS) , or digital display (DD), and/or have the characteristics of one or more of the following classifications:

(2)(a) – (6) Remain as is.

(7) “Noncommercial sign” means a sign that does not display a commercial message. For the purpose of this rule, only “welcome to” community and “public service” signs such as DARE, or ABATE, are considered noncommercial signs. The Montana department of transportation shall make the determination of a noncommercial sign designation on a case-by-case basis.

(8) – (12) Remain as is.

(13) “Official signs and notices” means signs and notices erected and maintained by public officers or public agencies within their territorial or zoning jurisdiction and pursuant to and in accordance with direction or authorization contained in Federal, State, or local law for the purposes of carrying out an official duty or responsibility. Historical markers, welcome to, public utility signs authorized by State law and erected by State or local government agencies may be considered official signs.

18.6.211 *Permits*

Lynch said this is to clarify our permit process. We didn't delete any language; we just added language.

18.6.211 PERMITS (1) – (4) Remain as is.

(5) The initial permit fee must be paid within 30-days from the approval of the application or the permit may be canceled.

(5)(6) 5 is renumbered 6.

(6)(7) 6 is renumbered 7.

(7)(8) 7 is renumbered 8.

(9) Ownership of a sign permit will not be transferred without the expressed written consent of the permit holder(s). The current permit holder(s) must sign the document transferring the permit.

(10) Permits cannot be canceled except by the written request of either the permit holder(s) or the landowner (s) subject to the department's approval or by violations of the provisions of the Outdoor Advertising Act. The document requesting cancellation of a permit must be signed by the current permit holder or the landowner(s).

(11) If the permit holder(s) are unable or unwilling to sign the cancellation document, the landowner(s) may request cancellation of the permit by providing the department with a document stating the reason for cancellation (such as termination of the land lease between the permit holder(s) and the landowner(s) and indicating whether the landowner(s) have purchased the sign structure or if the sign structure will be removed. The landowner(s) must sign this document.

#### *18.6.212 Permit applications – new sign sites*

Lynch said this is also to clarify the permit process and deal with some confusion in the past as far as what is the physical place of a sign.

##### 18.6.212 PERMIT APPLICATIONS - NEW SIGN SITES

(1) – (2)(b) Remain as is.

(3) The applicant must clearly mark the physical place the sign is to be erected with the exact location of the proposed sign site to enable department personnel to perform the required site inspection.

#### *18.6.221 New sign erection*

Lynch said this allows an extension of the allowed time from the time a permit is obtained to the time the sign is installed. It allows the Montana Department of Transportation flexibility under certain circumstances to grant additional time. There may be some reasons beyond their control that they couldn't get a sign up. Commissioner Kottel asked if the sign owner did not erect the sign within six months, and does not ask for an extension time, if the permit would expire. Lynch said it would.

18.6.221 NEW SIGN ERECTION (1) The sign owner within six months of the date of issuance of the permit will:

(a) erect the sign structure (an extension of time to erect the structure may be granted upon written request from the sign owner and at the discretion of the Montana Department of Transportation);

(b) – (c) Remain as is.

(d) attach name plaque to structure identifying the sign owner.

~~(d)~~(e) d is lettered e.

(2) Remains as is.

#### *18.6.232 Commercial electronic variable message signs*

Lynch said we are recommending that the original language be retained, and that proposed changes be disregarded.

##### 18.6.232 COMMERCIAL ELECTRONIC VARIABLE MESSAGE SIGNS

(1) Off-premise commercial electronic variable message signs(CMS), regardless of the message, are prohibited in controlled areas. which presents a new message, pictorial image, or change illumination at a rate less than one every six seconds is determined to be flashing or moving light and are prohibited in controlled areas.

(2) A commercial electronic variable message sign (CMS), may be approved as an off-premise outdoor advertising sign within the zoning jurisdiction of city and town areas if the sign does not contain flashing, intermittent, or moving lights, and does not cause a glare on the roadway and the following conditions are met:

(a) A message on a sign must have a minimum display (dwell) time of 6 seconds and a maximum change (twirl) interval of 3 seconds; and

(b) A sign must contain a mechanism that will stop the sign in one position if a malfunction occurs; and

(c) Signs shall be water tight, with service holes to provide access to each compartment with fitted waterproof covers; and

(d) Signs must not be placed with illumination that interferes with the effectiveness of or obscure any official traffic sign, device or signal; and

(e) Signs must not include or be illuminated by flashing, intermittent or moving lights; and

(f) Signs must not cause beams or rays of light to be directed at the traveled way if the light is of such intensity or brilliance or is likely to be mistaken for a warning or danger signal or to cause glare or impair the vision of any driver, or to interfere with the driver's operation of a motor vehicle; and

(g) Illumination or lights for signs must not resemble or simulate any lights used to control traffic; and

(h) Jumping arrows or rapid chasing or flashing lamp borders is prohibited; and

(i) Techniques of message display such as fading, exploding, dissolving messages are prohibited; and

(j) Signs shall only be constructed as a single face, back-to-back or two-faced V-shaped structure. Only one face may be visible in each direction of the main traveled way. Side by side or stacked signs are prohibited;

- (k) Signs are prohibited on horizontal and vertical curves; and
- (l) Signs are prohibited within 1000 feet of an interchange or railroad crossing and within 500 feet of an intersection; and
- (m) Signs shall not be placed within 2000 feet of another sign measured along the nearest edged of the pavement between points directly opposite the signs on the same side of the roadway; and
- (n) Signs located within 1000 feet of highway work zones where changing traffic patterns, sudden stops, workers, pedestrians and work equipment are present will be turned off for that period of time to be determined by the Montana department of transportation; and
- (o) Portable signs may not be used as permanent illuminated signage; only fixed signs are permitted; and
- (p) Wording that implies a traffic control or highway emergency(for example, use of the word "STOP" is prohibited).
- (q) Traffic Control Device (TCD) signs or symbols (such as an eight-sided stop sign) in signs are prohibited; and
- (r) No sign may be illuminated to a degree of brightness that is greater than necessary for adequate visibility. Signs found to be brighter than necessary for adequate visibility shall be adjusted by the person owning or controlling the sign in accordance with the instructions of the Montana Department of Transportation; and
- (4) An existing sign may be modified or updated if the sign conforms with established criteria relating to zoning, size, lighting and spacing. Prior approval from the Montana Department of Transportation is required to modify existing signs, to include a new sign application and a new nonrefundable application fee of \$200.00 will be charged.

#### 18.6.242 *Ranch and rural directional signs*

Lynch said the main change allows an increase in the size of ranch and rural directional signs from 8 x 36 inches to 4 x 8 feet.

18.6.242 RANCH AND RURAL DIRECTIONAL SIGNS (1) In rural residential areas, slot type directory Directional signs are allowed at the outer edge of the right of way of the intersecting roadways that enter into the main travel way, and may only be erected along the federal-aid primary highway system, giving the name only. Each slot directional sign is not to exceed 8" x 36" 4'X 8'.

(2) In cases where operations do not abut the highway, but have access via a nonpublic access road across other ownerships, directional signs may be located along this roadway leading to the operation, may bear the name of the operation or owner and distance to headquarters, but shall include no advertising. The message content on directional and ranch signs shall be limited to the identification of the attraction or activity and directional information useful to the traveler in locating the activity, such as mileage, route numbers, or exit numbers. Descriptive words or phrases, and pictorial or photographic representations further describing the activity or its environs are prohibited.

(3) Ranch and rural directional signs may only be erected along the federal-aid primary highway system. The message content on rural directional signs shall be limited to the identification of the attraction or activity and directional information useful to the traveler in locating the activity, such as mileage, route numbers, or exit numbers. Descriptive words or phrases, and pictorial or photographic representations further describing the activity or its environs are prohibited. Not more than one ranch sign or directional sign may be erected which is visible to traffic proceeding in any one direction on any highway and advertising activities being conducted upon the real property, including ranching, grazing, and farming activities

(4) – (6) Remain as is.

(7) Not more than one ranch sign may be erected which is visible to traffic proceeding in any one direction on any primary highway and advertising activities being conducted upon the real property, including ranching, grazing, and farming activities.

#### 18.6.245 *Noncommercial signs*

Lynch said this took out the language addressing "welcome to" visitor signs and removes the limitation for the sign to 150 square feet. The new rule lets the city decide what size their sign should be. We would still retain authority to approve the permit.

18.6.245 NONCOMMERCIAL SIGNS (1) If a noncommercial sign is located on property of the owner of the sign, it shall be considered to be an on-premise sign and not subject to the provisions of this rule.

(2) A noncommercial sign of a local government may be erected anywhere adjacent to an interstate and primary highway within its territorial or zoning jurisdiction, except in a scenic area or parkland, so long as the sign does not create a safety hazard to the traveling public.

(a) A noncommercial sign will not be considered in determining the spacing required between conforming outdoor advertising signs located off premises.

(b) Local government may erect, within the limits of their jurisdiction, noncommercial signs welcoming travelers and describing the services and attractions available but may not advertise private business or brand names.

~~(c) Not more than one noncommercial sign welcoming visitors or providing information about a community is allowed on each highway entering the community, subject to federal and state outdoor advertising control (OAC) rules.~~

~~—(3) A noncommercial "welcome to" community sign shall not exceed 150 square feet in size.~~

~~(4)~~(3) 4 is renumbered as 3.

~~(5)~~(4) 5 is renumbered as 4.

Chairman Kennedy said these rules would regulate outdoor advertising signs on interstate and primary routes, and asked Lynch to clarify what that means.

Lynch said interstate would be Interstate 90, 15 and 94. Primary routes would be like Highway 93, Highway 2, US 12. It doesn't cover urban routes or the city roads, or secondary highways. Those are governed by local ordinance. These regulations don't trump those.

Chairman Kennedy said I'm going to go to Billings where I'm familiar, 27<sup>th</sup> Street, State Highway, Main Street: those would not be considered interstate or primary?

Reardon said you [the commission] designate the primary routes. You have to remember that the state law and the federal law don't necessarily mesh real well here. Title 75 in Montana Code talks about the primary system. There are references in federal law to the NHS system. They've kind of moved away from primary, secondary, urban. They've gone to NHS. So, you designate, and have designated, and probably have to get a state map to show you, the primary routes, which is a state law.

Lynch said we have to remember we are only addressing off-premise advertising. For example, a city sign on city property would not be included.

Straehl offered a clarification on the systems question. The federal law speaks about the "old" primary system which has now been taken into, if you will, the non-interstate national highway system in Montana, and the state primary system. And I believe, even though it speaks to the primary system, it includes both the primary and NHS routes. For example, US 93 is a designated national highway system route, it's not a designated primary route. It used to be a primary route.

Commissioner Howlett asked if ordinances would take precedence over the administrative rules. Reardon said a local government could make more restrictions, but not make it more expansive. There are zoning restrictions on commercial activities in a lot of counties. Reardon said a great many signs have been grandfathered into existence. Removing them can be considered a "taking" and subject to compensation. We do not extend our jurisdiction to the secondary highways. We don't regulate on-premise advertising, for example, the hardware store and restaurant currently prominently displaying electronic signs on North Montana Avenue in Helena.

Chairman Kennedy asked if we have a map showing interstate and primary routes. =>  
Straehl said she could get one. The state map doesn't show them clearly. If the shield is square, it's probably a primary route. If it's the shape of a shield, it's probably a national highway system route. It's still not clear in my mind if this subsumed the NHS with it.

Duman said the NHS act came about in 1995. Prior to that, we had primary, designated federal-aid primary, secondary and urban systems. The interstate was a subset of the primary system. In terms of the outdoor advertising control, it would apply to the primary system that was approved around 1987. Those historic maps showing the systems are important. Then we talk about whether we're in a commercial or industrialized zone and what the regulations are that pertain in terms of off-premise signs and outdoor advertising. They're allowed in commercial and industrialized zones; they're not if there were on that system... that's it in a nutshell.

Straehl said that answers my question. All the red lines on the state map are essentially the old primary. They are now partially state primary; there's no longer a federal primary system, it was what the snapshot was in 1987, and that snapshot is now part of the state primary

system plus the national highway system routes that are designated both by the commission and by Congress.

Lynch said to get back to Bill's question, which is do our rules govern what happens on Main Street, Billings. Straehl said if Main Street in Billings is on one of those old primary system roads, it would. Duman said we have to know if we're talking about on right-of-way or off right-of-way. Signs on right-of-way are considered traffic control signs and has a whole different process on what kind of sign, shapes and colors and information. We have to be clear that we're talking about off the right-of-way. And, are we within a commercialized, industrialized zone? It has different rules for outdoor advertising.

Commissioner Kottel clarified that the definition of on-premise signs is not about physical location; it refers to the sign advertising only the goods and services provided on the premises. If the company goes out of business, a sign on the roof could not be used to advertise another business. But, could it be used to say "Welcome Special Olympics" or "Welcome Class B Tourney" or "Congratulations graduates" etc.?

Reardon said my interpretation is that it would be permissible. There is not a good definition in state law for advertising. Welcome or congratulations messages would probably be considered a public service, not advertising. Frankly, I'm not sure what the enforcement mechanism would be by the times the Special Olympics are over.

Commissioner Kottel said there's quite a bit of detail in terms of the variety that can take place in signage. Reardon emphasized the entire subject of outdoor advertising is not simple. It is particularly not simple if you've not been involved in it for a long time. It's not just about the evolution of the rules, it's also about the evolution of the state and federal laws. There is a lot of history.

Reardon said as far as the question regarding primary and NHS, the best I've been able to come up with so far is if a route was ever on the primary system, even if it was absorbed into the NHS, it's probably still under our jurisdiction. Sandy would be the one who could establish which routes have ever been on the primary system.

Chairman Kennedy asked about the fairgrounds in Billings. Lynch said that would be considered on-premise advertising, which is beyond the scope of the rules under consideration today.

Chairman Kennedy noted for the record that the public hearing was held March 17, 2006. We have documentation of the hearing, who attended and what was said. Since the hearing, we also received written comments from the following:

Save America's Visual Environment, five-page document dated 5/25/06

e-mail from Rune Strom to Pat Hurley

Wendell and Barbara Beardsley

Web Brown

Mark "Ole" Olsen, Country Store Ole's Beer Depot

Wendy Cochran, Iron Horse Ranch

James Lynn, Bozeman

Elouis Hill, Kalispell

L K Christensen

Juanita Fern Hart, Missoula

Joel Vignier, Lakeside

Richard Manke and Susan Lupek

Nancy W Gordon

Michael Moffit, Whitefish

Elizabeth K Wood

Pete and Carol Daniels, Polson

Diane Grove, Whitefish

Deborah Hanson, Miles City

Bob Walden, Wolf Point

Joan Vetter Ehrenberg, Whitefish

Although they were not part of the public hearing, they will be part of the public comment time that we have here. At this time, we have time for public comment. Each person will have two minutes to make their comments on the recommendation that came forward today.

Paul Dennehy, LAMAR Advertising, said I have a question about process. At the public hearing March 17, Mr. Scheier closed and opened the hearing with the statement that comments would be accepted through 5 pm on March 17. If I understand correctly, there was something put out by the MDOT, some kind of notice to the city of Whitefish and the city of Great Falls pertaining to comments regarding this issue. My big issue is, I went to the city of Whitefish that does not even allow outdoor advertising. If something like that was to go out, it should go out to the state. So I question that as far as proceeding goes. I would assume that if Mr. Scheier said no comments were allowed after the hearing on March 17, none of that should be part of the record.

Reardon said Mr. Dennehy makes a valid point in terms of the record you will decide on and the comments you need to respond to. Under the Administrative Procedures law, once you have decided what you're going to do with these rules, you have to go forward and publish notice of the adoption of those rules, probably in July. You must also, by law, respond to comments received during the hearing period. It's impossible for you, under state law, not to accept public comment on any matter that's coming before you that's of interest to the public. That's the law. Is it in conflict with the Administrative Procedures Act (MAPA), well it might be, but the Legislature was very deliberate that there be a public comment opportunity on any item that is before this body, or any other administrative body, and you have to at least accept the comment. You can't stop anybody from coming here and talking to you or saying something.

Commissioner Espy asked if that meant we should ignore everything we heard today.

Reardon said it would be fruitless for you to have a public comment period on this item without allowing public comment, but you do not need to incorporate public comment received today in the formal record nor respond to them under the MAPA.

Lynch said the hearings process doesn't preclude the citizens of Montana from speaking their mind, today or any time, on any issue. Your obligation is to respond to these rules, and your response has to be to the hearing information, but it doesn't mean that information is the only thing that you can use to determine the decision you make.

Dennehy said my question in response to that would be why would Mr. Scheier close comments at the end of that day.

Chairman Kennedy said the purpose of the hearing deadline is so that the hearing officer can have a point at which he makes a report. Otherwise, the hearing would go on forever. The list of names I read off earlier are people that wanted to make public comment, and now we give all of you folks an opportunity to make public comment too.

Dennehy said if the intention was not to cut out public comment, why was the notice in the Whitefish paper and the Great Falls paper, and not all papers in the state?

Reardon said I don't know anything about it; I don't know what notice he's talking about. Dennehy said it was a notice after the March 17 meeting to submit comments on electronic messages. Reardon asked if the state of Montana put that in or if it was private. Dennehy said it was state of Montana, Department of Transportation.

Dennehy said Mr. Scheier's remarks, at the end of the hearing report, were that the new rules comply with state regulations and that if the electronic message boards were allowed at longer than six second increments, they can fly with the present regulations. My question again would be that if MDOT wrote the new regulations, the presiding officer said they do comply with state regulations, and the majority of the people at the hearing were pro regulation change, why are we coming back now and saying leave it as it is? I'm confused on that.

Chairman Kennedy said this is public comment time; this is not question and answer time.

Dennehy said then I will leave it as I'm confused with why they wrote the recommendations to change, the presiding officer agreed they were in compliance with the state code, and the majority of the people at the hearing were for the changes, and now there's an issue of leaving it as is. To finalize, I have a disc of what we're trying to do with our electronic message boards that I would love to show the committee, if possible. I don't know if you'll give me the time; it's a five minute tape. I don't know if that's allowable or not. Chairman Kennedy said I think you could submit a disc to each of the members. Dennehy said I only brought one with me and I will submit it for the record.

Melinda Daley of Helena said thank you for the opportunity to comment. Given tri-vision signs proven ability to distract drivers, regulators should be guided by the US Court of Appeals for the Fourth Circuit declaration that "No empirical studies are necessary for reasonable people to conclude that billboards pose a traffic hazard, since by their very nature they are designed to distract drivers and their passengers from maintaining their view of the road."

I would like to point out on page three of the hearing officer's report, the officer states that "traffic safety experts have found no connection between billboards and traffic safety". There is no study cited here, yet time and time again, reports are either inclusive or leaning towards a safety distraction issue.

I ask the commission to look to their common sense and trust their judgment here. If a company is paying thousands of dollars for a billboard, and another company is paying for advertising, what is the motivation? It's clearly to take the driver's eyes off the road and read the sign. With a changeable message sign, there will be a new message every six seconds. So every six seconds, the driver is tempted to read a new message. That creates a sense of urgency to the driver, and thus a greater distraction than a static billboard. Every six seconds in Montana, that driver would be taking their eyes off the road. That's along with the deer, elk, motor cycles, bicyclists, on and on, for every six seconds.

According to statistics, Montana offers some of the most hazardous roads in the country, with 2.04 fatalities per 100 million vehicles miles traveled (VMT). The average for the US is 1.44 per 100 million VMT.

Daley also presented written testimony on behalf of Joan Vetter Ehrenberg.

Joan Vetter Ehrenberg then offered testimony via telephone. I live in Whitefish, Montana. Mr. Rotering states in his opening statement that he "believes the proposed rules are permitted under the language of the statute." It's my opinion, as a member of Governor Racicot's outdoor advertising taskforce of 1996, that the Department of Transportation's acceptance of the proposed rule changes is not in accordance with the declaration of the Montana Code as written for outdoor advertising.

In reference to commercial electronic variable message signs, the original document states that regardless of the message, they are prohibited in controlled areas. It's clear language stating specific types of signs are illegal and prohibited.

Mr. Lynch addressed it in his opening statement very clearly that this is a very controversial issue. The proposed changes, I have some documentation there that I asked someone to hand to you, allows for changes every six seconds. The authorization cited for the rule change is cited as 75-15-121 which is "Commission rules authorized. The commission may adopt rules to control the erection and maintenance of outdoor advertising along the interstate and primary highway system in conformance with the terms of this part and in conformity." I don't see where that says that the previously illegal changeable message signs within a city and town are now legal has anything to do with the maintenance or putting up of signs. I believe this is an egregious misinterpretation of statute, and has nothing to do with the intent of the law as written.



The hearing officer states of page 127 of his report that the proposal would be “inconsistent” or “out of harmony with the statutory language” asserting that a sign changing every six seconds is stationary. I strongly disagree. These proposed signs are not stationary. They are flashing, whether they change every six seconds, eight seconds, or 16 seconds, an electronic sign that moves and changes under a minute is a flashing sign. Try explaining to a child that new flashing signs they see all over our scenic state are not flashing because a lawyer ruled that six seconds meant time now stood still. So they’ll tell their parents they are still as they jump around the living room every six seconds from couch to couch, and say I’m not moving Mom, because those flashing billboards aren’t moving either – right?

I would propose that we vote no as far as the changeable message signs. Thank you very, very, very much for allowing me to participate in this hearing. I really appreciate it.

Rick McAlmond from Helena said maybe to clarify some of the comments earlier, as far as 27<sup>th</sup> Street: if there are city ordinances, local or county ordinances that are more stringent than the department’s rules, we as the industry still have to follow the more stringent rules. Hopefully that clears it up. There are many, many areas and towns in Montana where this comes into effect. Before we apply for a state permit, we still have to get any local government to sign off on it first.

Chairman Kennedy closed the public comment time and recessed the meeting for a five-minute break.

After calling the meeting back into session, Chairman Kennedy asked Lynch to summarize this for the commission. Lynch said the department’s recommendation is to accept the rules as proposed at the public hearing on March 17 with the exception of two items: rule 2 (1) after the word “on-premise”, add the words “non-profit” and (f) define a non-profit owner as “schools, churches, and/or local government.” The second change we recommend is to make no changes on ARM 18.6.232. Leave the rule as it exists, which is basically off-premise commercial electronic variable message signs (CMS) regardless of the message are prohibited in controlled areas.

Commissioner Kottel asked if no motion is made, does the current rule stay the same. Reardon said under the Administrative Procedures Act, once a rule is noticed in the register, you have six months to act: to adopt, reject, or amend the proposed rules, or they essentially die of their own volition and you begin the process over. There is an interim step, you can extend that period but you have to do it by publishing another formal notice. The answer to your question is if you do nothing, the proposed rule will die, and the existing rule remains in effect.

Chairman Kennedy said we either need to adopt the rule changes, reject the rule changes, or amend the rule changes, or we do nothing. Reardon said you can do nothing about any of them or some of them. Reardon said the adoption order will need to incorporate responses to the comments received. Chairman Kennedy said we will have the order and the response for each one so we fall under the limits of being able to address this before August 9<sup>th</sup>, correct? Reardon noted none of the rules take effect until they have been published with the Secretary of State; the earliest that would be is July 27, that’s assuming we get the order and notice of adoption filed by July 17.

Commissioner Kottel moved to adopt rule I *official signs* into the Outdoor Advertising Regulations – Administrative Rules of Montana (ARM); Commissioner Griffith seconded the motion. The motion passed unanimously.

Commissioner Kottel moved to adopt rule II *recognition of sponsors, benefactors and support groups* into the Outdoor Advertising Regulations – ARM, amended so the word “non-profit” is inserted between “An on-premise” and “sign owner” (to read “An on-premise non-profit sign owner may...”), and the addition of section (f) under (1) to state: “A non-profit is a school, church, or/and other local government entity.” Commissioner Griffith seconded; the motion passed unanimously.

Commissioner Kottel moved adoption of administrative rule 18.6.202 *definitions* as presented; Commissioner Griffith seconded. The motion passed unanimously.

Commissioner Kottel moved adoption of administrative rule 18.6.211 *permits* as presented; Commissioner Griffith seconded. The motion passed unanimously.

Commissioner Kottel moved adoption of administrative rule 18.6.212 *permit applications – new sign sites* as presented; Commissioner Espy seconded. The motion passed unanimously.

Commissioner Kottel moved adoption of administrative rule 18.6.221 *new sign erection* as presented; Commissioner Espy seconded. The motion passed unanimously.

Commissioner Kottel moved the acceptance of administrative rule 18.6.242 *ranch and directional signs* as presented; Commissioner Espy seconded. The motion passed unanimously.

Commissioner Kottel moved adoption of administrative rule 18.6.245 *noncommercial signs* as presented; Commissioner Espy seconded. The motion passed unanimously.

Commissioner Kottel said I'd like to state for the record my personal opinion regarding 18.6.232 – *commercial electronic variable message signs*. I personally think this is an important issue. I think the new technology is important and I think there will be very soon a day when everyone will wonder why we ever printed signs on paper and sent people up to paste them on a billboard when technology is available to have clear signage available to individuals. I also think it could be a wonderful benefit to many communities; I'm thinking of amber alerts or being able to put a child's photo immediately up on a sign to immediately change a message in terms of a community emergency. I think all of things are certainly the wave of the future. One of the things that disturbed me is I'm not sure we sat down in terms of the hearing to truly look at a piece of legislation, this is obviously an administrative rule, that really does justice to both sides of the issue. For me, for example, anything under six seconds becomes forbidden. But anything over six seconds gets labeled this commercial electronic variable signage. What about a sign that only changed once a day at midnight? What about a sign that only changed three times a day, once for the morning traffic, once for an afternoon message, and once in the evening, allowing three different people to advertise to a specific target market? And yet it would be labeled, because it changed more than six seconds, as this, and I'm not sure that sign should come under something like this. I would like to see this go to the legislature. I would like to see us discuss the issue of signage but also be able to embrace technology in an appropriate fashion and in a way that does justice for people of Montana to be able to protect their city but also be able to do justice to those who want to advertise and have low-cost advertising options available to them. I think this was premature, in my mind, in terms of how this was written.

Chairman Kennedy said I think you are correct. I think this is going to end up at the legislature. I think it's an issue that we have heard about and seen about statewide. I think we have a lot of industry folks here. We have a lot of businesses that have responded to this. We've also had a lot of folks on the phone, on the e-mail, and have come out personally on this issue. It's a larger issue that people have looked at.

Kennedy expressed concern that the draft rules expanded the scope of an area of signage more than the commission realized, and were caught somewhat by surprise. He acknowledged we have people interested in the scenic beauty of the state, and the interest in economic development. It shouldn't be a fight to have the beauty of the state and bring people into the state, and also have an awareness out there of what businesses are out there. You folks have spent more time and speak to us, and to go to the public hearing. I think you're very correct on the fact that this does needs more scrutiny and more time to speak on the issue. At this time, I think we are really addressing today what we thought that would come back to us, that was the welcome signs and the signs for the schools. Given that, are there any other comments?

Commissioner Howlett said I've never been lobbied so hard. I was quite taken by surprise with the phone ringing off the hook in my office yesterday morning. Something had appeared

in the paper in Kalispell and Whitefish to call me at my office and vote “no” on this subject. I’m not going to support an extreme position. You don’t have outdoor advertising where you have wide open. I think we need to really look at things like density, and have some of these signs that have some technological advancement, and perhaps we won’t need as many signs out there. There are ways that this can be done to find some happy ground. We need to be responsive to the differing needs of different communities; e.g. the rural parts of the states need ways to pull people off the roads and into their communities. By leaving this as it is, I guess we’re saying we understand it needs more discussion, and it needs to be something that doesn’t pit the west against the east. I had 27 e-mails and 49 phone calls yesterday from people in my district. However, I have to consider everyone in the state, including Broadus, Butte and Billings.

Commissioner Griffith said the department did a real admirable job of trying to weigh the public comment on this issue. There’s a lot of hard work and a lot of good things that happened, and this whole policy that I agree with. I think it’s a very good change, and I agree with Deb that there is a better forum to discuss the one issue. I think they did a very good job of trying to get the whole state to understand that we’re business partners. You need the Department of Transportation as much as we want to be open for business in the state, and I think that’s the one thing that gets lost in the shuffle: we are business partners but we do have public policy issues that we have to deal with. I think they did a great job in realizing that.

Commissioner Espy said I think that the law as written for us to vote on today, the changes and the electronic variable message signs, are probably something that we will see in Montana. But I do believe that many of points made were very good and a lot of forethought went into them. As we catch up with technology, and it becomes acceptable to the citizens of Montana, we will still see the changes. I’m personally a little concerned about the distances that you had. We travel through the black hills of South Dakota, and they have billboards that are so huge and are so offensive, that we would never want to carry our technology in that direction. I think that you and the industry are just as interested and concerned as we are. If we’re going to do it, do it right. I agree with Deb’s recommendation, that it should go to the legislature, and let us hear from them and from their constituents, and perhaps we’ll get a better feel for the entire state.

=> Chairman Kennedy said he was still confused over interstate versus primary, and asked for a map at the next meeting so that everyone is on the same page. He asked that it include the roads within cities and towns.

Lynch said much more time would be available for dialogue and communication on this issue if this went before the legislature, for citizens to speak their minds, and allow the people they elected into office to make that decision.

Kennedy said I hope our work and our information will be provided to them so they can look at this. It’s not an easy subject. I think there are a lot of questions still out there about what this covers and what it doesn’t.

Lynch said 18.6.232 deals with just off-premise commercial variable message signs. By not making a change, this means that there won’t be any change in the billboards out there today. Off-premise doesn’t mean that the sign is off-premise, but the advertising is for something other than is there at the sign’s location.

Commissioner Griffith said there’s an education thing too that has to go on here. We all see the on-premise signs as the bright, flashing, get-your-attention signs. Really, whether you agree or not, they are a distraction because you can see the sign from four or five blocks away. I know that this is not the type of sign that’s proposed here. It’s hard to convey to the general public that digital billboards are not the same thing. To the public, there is not a difference between off-premise and on-premise signs.

Chairman Kennedy said some of the comments received didn’t want signs at all. They may not quite have understood what the rules were. I think you’re correct that there needs to be an education process. I’ll tell you, this created some of the most public comments that we have had in the last year-and-a-half on the commission.

Lynch said by not taking action on this rule, it's not dead, and you'll still receive comments. If your intention is to wait until August 6 and not take any action, my recommendation would be to let the public know so they can do what they need to do, rather than wait until August 6.

Commissioner Howlett moved to *not* adopt the proposed changes to administrative rule 18.6.232 *commercial electronic variable message signs* and to refer the matter to the Montana legislature; Commissioner Espy seconded. The motion passed unanimously.

=> Kennedy said at our next meeting in Red Lodge, we will have before us a timeline for adoption of the rules that passed, and responses to the comments received during the public hearing process.

The meeting adjourned at 3:50 pm.

Bill Chairman Kennedy, Chairman  
Montana Transportation Commission

Jim Lynch, Director  
Montana Department of Transportation

Lorelle Demont, Secretary  
Montana Transportation Commission